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MICHAEL RODAK, JR., CLE

No. 72-483

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

FRANCIS R. SALAZAR,
Petitioner

v.

UNITED STATES OF AMERICA

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FRANCIS R. SALAZAR, Your Petitioner, pursuant to the provisions of Rule 24(5) of the Rules of the Supreme Court of the United States, hereby supplements his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit by calling to the Court's attention the decision in United States vs. Docherty, ___ F.2d ___ (Slip op. 293; 2nd Cir., Oct. 31, 1972).

In reversing Docherty's conviction with instructions to dismiss the Indictment as to one Count of an Indictment charging him with conspiring with Edward Evans, a bank officer, to violate 18 U.S.C. §§656 and 1005 and four substantive Counts charging him with aiding and abetting

Evans in violating §656, Chief Judge Friendly, in United States vs. Docherty, supra, makes some profoundly significant observations relative to 18 U.S.C. §656 of particular significance here which highlights the importance of the Federal question pertaining to the existing confusion as to the meaning of the phrase "willfully misapply" as used in 18 U.S.C. §656. Further, Chief Judge Friendly's opinion in United States vs. Docherty, supra, conflicts, at least in principle, with the opinion of the Court of Appeals for the Tenth Circuit, below, which affirmed Petitioner Francis R. Salazar's conviction as a bank officer of one Count of conspiracy to violate 18 U.S.C. §656 and one substantive Count of violating §656.

The opinion in United States vs. Docherty, supra, disclosed that Docherty and Evans (who, by 1968 had risen to the post of assistant vice president in charge of the personal loan section of Manufacturers & Traders Trust Company of Buffalo's [M & T] Installment Loan Department) became and remained, close personal friends (Slip op. 294).

The troubles of Docherty, a lawyer, began in October, 1965, when Evans, the bank officer, ". . . told Docherty that he needed money to buy some stock and requested that Docherty borrow $2,000 and reloan it to him . . ." (Slip op. 295), the reason for this, Docherty was told by Evans, was ". . . that bank policy prohibited his borrowing from his own bank . . ." (Slip op. 295) and that Evans' bank also "frowned upon" his borrowing from another bank. Docherty then filled out a note and application for the loan, Evans telling Docherty ". . . there was no need

to complete the credit statement or furnish other information. . .", since the bank had Docherty's financial statements in connection with his personal loans at the bank (Slip op. 295). The facts further disclosed:

> ". . . The bank made the loan; Docherty picked up the $2,000 check, cashed it, and gave Evans the proceeds. He also turned over to Evans the 'coupon book' which reminded the borrower of the dates and amounts of installment loan payments." (Slip op. 295).

The process was repeated in February, 1966. When Docherty asked what had happened about the first loan, Evans said it had been paid, and essentially the same process was repeated in June, 1966, and May, August and September, 1967, and in February and April of 1968 (Slip op. 295). The Court noted:

> ". . . Evans' stories to Docherty were that he wanted to buy stock, to pay off earlier loans or, on one occasion, to invest in a gas station. . ." (Slip op. 295-296).

As to the substantive Counts based on these transactions, the jury acquitted as to the 1965 and 1966 loans and disagreed as to the others (Slip op. 296).

As to the four substantive Counts on which the jury convicted Docherty, the facts were:

> "In July 1968 Evans asked Docherty to take out a loan of $4800. When Docherty

protested that the amount was too high, Evans answered that he had decided not to buy stock but would instead use the proceeds to repay a prior loan. Docherty deposited the bank's $4800 check in his own account, drew a check in the same amount to M & T, and gave it to Evans. Evans turned it over to M & T in payment of the earlier loan, and Ourser, a vice president of the bank, advised Docherty that the loan had been repaid. On September 4, 1968, Docherty made another $3,000 loan; the proceeds went to Evans. On October 29 he signed a blank note at Evans' request; Evans filled it in for $6,292.44. Of the $5,000 in net proceeds, $2,000 were used to pay off the September loan, and a $3,000 bank check was deposited by Evans, without Docherty's endorsement, to the account of Larry's Petro Service, which he was also manipulating, without Docherty's knowledge. The final transaction occurred late in 1968 or early in 1969, when Docherty, assuming that all earlier loans had been paid by Evans, signed another blank application and note. The bank issued a check for $4800 payable to 'R. Docherty.' Evans forged Docherty's endorsement and cashed the check at a Las Vegas hotel. When signing this last note, Docherty had demanded that Evans render an accounting before he would endorse any more checks; doubtless this led to the forgery. The jury convicted on the four substantive counts relating to these notes." (Slip op. 296).

Late in 1968, Docherty received his first "late payment" notice from the bank and upon learning

it did not relate to one of his personal loans, telephoned Evans, who said that the bank had made an error and that the notice should be sent on to him (Slip op. 296-297) and ultimately it was discovered that Evans had been manipulating the accounts of six or seven other friends and making payment of the old loans with the proceeds of new ones (Slip op. 297). The total of "embezzlements" by Evans was in the neighborhood of $300,000 (Slip op. 297).

Counsel would further point out to the Court that in Docherty, supra, it appeared that there was a New York statute which prohibited any bank or trust company from lending money to any executive officer of a bank except under certain conditions (United States vs. Docherty, supra, Slip op. 298n. 3.) whereas in this case the prosecution admitted:

> ". . . There was asserted no prohibition against the officers borrowing against the bank. . ." (Petitioner Salazar's PETITION FOR CERTIORARI, pg. 25)

The facts in United States vs. Docherty, supra, were much more favorable to the prosecution than were the facts involved in the alleged conspiracy and single substantive Count as to which Francis R. Salazar was convicted.

The facts pertaining to the loan transaction which was the basis of Petitioner Salazar's conviction affirmed by the Court of Appeals for the Tenth Circuit below, are set forth at page 6 et. seq. of Francis R. Salazar's PETITION FOR A WRIT OF CERTIORARI filed herein and will not

be unnecessarily repeated. The undisputed facts disclosed that Cooper-Alpert through some fifteen different corporations, had developed three residential subdivisions consisting of between 1,100 and 1,200 homes on which they had borrowed a total of $27,500,000 and $30,000,000 construction money (III Tr. 388).[1/] On the basis of a financial statement showing a net worth of $796,000 (III Tr. 385-386) they borrowed $65,000 from The Rocky Mountain Bank and advanced or reloaned the proceeds of said loan to Petitioner Salazar's co-defendants at trial, Delmar, Donald and Paul Cooper, to pay a first mortgage on the Denver Revival Tabernacle property (owned by Delmar, Donald and Paul Cooper) which had been called by the American National Bank of Denver, Colorado, outstanding liens against the Tabernacle property and an advanced attorney fee to Petitioner Salazar for handling an intended negotiated sale of said Tabernacle property to Cooper-Alpert. The payment of said first mortgage to American National Bank on the Tabernacle property was necessary to protect the second mortgage position of The Rocky Mountain Bank, of which Petitioner Salazar and his co-defendants below, Delmar, Donald and Paul Cooper, were officers.

When the intended sale of the Denver Revival Tabernacle property to Cooper-Alpert did not materialize, the entire $65,000 loan plus a total of $4,161.66 interest was repaid The Rocky Mountain Bank. Harvey Alpert (Cooper-Alpert)

1/ References are to the volume and page of the trial transcript.

as a government witness[2/] repeatedly acknowledged at trial primary liability for the payment of said $65,000 loan (III Tr. 379, 389, 390, 395-396) and the trial court specifically found:

> "Alpert was solvent. I remember that, so, let's go on, and he was on the note and he was solvent. That was a good note financially." (IX Tr. 1556, lines 1-3; emphasis supplied)

The Court further finding:

> "Yes, Alpert's note was good. . ." (IX Tr. 1637; emphasis supplied)

The trial court further agreeing as to the various loan transactions involved in all counts that:

1. "Well, all of the loans were reported, there is no question about that." (IX Tr. 1538)

2. There was no evidence of any loans that "Were without proper security." (XIII Tr. 2382, lines 21-24)

3. There was no question "as to the adequacy of security." (XIII Tr. 2382, line 25, and XIII Tr. 2383, line 2)

2/ The government made no effort to produce Michael Cooper (Cooper-Alpert) at trial although he was readily available.

4. There was no evidence of causing a loan to be made to a "fictitious borrower." (XIII Tr. 2383, lines 2-7)

and as to "misapplication," the trial judge stated as to the facts involved:

". . . Maybe this isn't even a crime. . ." (XII Tr. 2349)

Yet, despite all this, appropriate motions for judgments of acquittal were denied as to the conspiracy Count and the single substantive Count involving the Cooper-Alpert loan transaction as to which Petitioner Salazar was convicted. Yet, the very same type of loan transaction involved herein was found, as a matter of law, not to constitute a "misapplication" of bank funds by another United States District Judge for the District of Colorado in United States vs. Karsten, Criminal Action No. 71-CR-317, Colorado United States District Court.[3/]

Now, Chief Judge Friendly, in United States vs. Docherty, supra, has ruled, as a matter of law, that evidence of a factually indistinguishable loan transaction is insufficient to sustain the conviction of the original borrower as an aider and abettor. It is axiomatic that before an individual may be convicted as an aider and abettor to a violation of 18 U.S.C. §656, a bank officer, director, agent or employee must, under said

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3/ This case is discussed at pages 24-25 of Petitioner Salazar's PETITION FOR A WRIT OF CERTIORARI filed herein.

section, embezzle, abstract, purloin or willfully misapply monies, funds or credits of a bank covered by said section. In Docherty, supra, Evans, the bank officer, clearly effected a "conversion" of the proceeds of the various loan transactions involving not only Docherty, but manipulated the accounts of six or seven other friends (Slip op. 297). Here, the loan to Cooper-Alpert was not only a good and financially sound loan as to which there was no "conversion" of the loan proceeds, but the loan was fully repaid together with a total of $4,161.66 in interest (Exhibit 500). Whereas, in United States vs. Docherty, supra, Evans had not repaid the bank all the proceeds of the various loan transactions involving Docherty, neither had Docherty paid same, the Court stating:

> ". . .[S]o far as concerns the transactions in which he [Docherty] participated, or of which he knew, he is bound and, so far as the record shows, is able, to make the bank whole. . ." (Slip op. 294)

In Docherty, supra, the Court observed ". . . the Government has sought to press to the verge. . . 18 U.S.C. §656. . ." and the problem was ". . . whether the Government has gone only to the verge or beyond it" (Slip op. 294). The Court further noted:

> "The phrase 'willfully misapply' has proved troublesome from the outset. . ." (Slip op. 299).

Further, the Court stated:

"In applying the provision of 18 U.S.C. §656 relating to 'wilful misapplication,' courts must be mindful of its history and avoid undue extension as a result of the ill-conceived work of the 1948 reviser. Until that time the statute, as previously noted, after defining the prohibited acts, had included a requirement of intent 'to injure or defraud' the bank or 'to deceive' a bank officer or agent appointed to examine the affairs of the bank. See 12 U.S.C. §§592, 597 (1945). When these sections were repealed and 18 U.S.C. §656 was substituted, by the Act of June 25, 1948, ch. 645, §656, 62 Stat. 729, the Reviser represented that: 'The revised section without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style.' Some courts, referring to the Reviser's Note, have properly held that intent to injure or defraud remains an element of the offense. E.g., Seals v. United States, 221 F.2d 243 (8 Cir. 1955); Logsdon v. United States, 253 F.2d 12 (6 Cir. 1958), aff'g. 132 F.Supp. 3 (W.D. Ky. 1955); Ramirez v. United States, 318 F.2d 155 (9 Cir. 1963). Others, including our own, while not discussing the omission of the intent language from §656, have continued to treat intent to injure or defraud as an essential element of the crime. E.g., United States v. Mullins, supra, 355 F.2d 833; United States v. Fortunato, supra, 402 F.2d 79. By the same token an intent to deceive remains an alternative mental element. See 18 U.S.C. §1005." (Slip op. 302; emphasis supplied)

In Docherty, supra, the Court in stating there was clearly no sufficient evidence of intent to "injure" the bank, stated:

> "Docherty knew he was putting his own credit on the line, and it is not suggested that he lacked the means to repay. Cf. United States v. Matot, 146 F.2d 197 (2 Cir. 1944). . ." (Slip op. 302-303).

Albeit, the Cooper-Alpert loan herein was financially sound and Alpert repeatedly testified he knew he was primarily liable for the repayment of said loan, i.e. that ". . . he was putting his own credit on the line. . ." and, there was affirmative evidence that he was financially able to repay same and further said loan actually was repaid with interest.

As to "defrauding," the Court noted in Docherty, supra:

> ". . . Even if we assume arguendo that failure to disclose the true recipient of the proceeds was a misrepresentation, the case lacks the element of foreseeability of damages essential even for a civil suit. Prosser, Torts §110, at 732 (1971). Cf. United States v. Harper, 33 F. 471, 481-82 (S.D. Ohio 1887); Seals v. United States, supra, 221 F. 2d at 249. Indeed, there will be no damages at all from the transactions in which Docherty took part, if, so far as the record shows, the notes are collectible. Beyond this we are by no means convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of

mind that would support a civil action. . ." (Slip op. 303)

At the trial of Petitioner Salazar, the very gist of the government's case was that there was a ". . . failure to disclose the true recipient of the proceeds. . ." of the Cooper-Alpert loan, the government prosecutor stating in final argument to the jury that:

". . . It is a violation of the law if the officer and director makes a loan in his own interest and conceals his interest from the bank . . . the crux of this case is whether or not there was concealment of the interests of the defendants charged. . ." (XIV Tr. 2442; emphasis supplied)

Yet, Chief Judge Friendly in Docherty, supra, states that even if a failure to disclose the true recipient of loan proceeds was a misrepresentation ". . . the case lacks the element of foreseeability of damages essential even for a civil suit . . ." The Court of Appeals below in holding the evidence was sufficient to sustain Petitioner Salazar's conviction as to the Count I (conspiracy count) and Count V (substantive count involving the Cooper-Alpert loan transaction), stated:

". . . The offense of 'misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank.' United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933.

> There was ample evidence to support the jury's conclusion that the Coopers and Salazar were receiving the benefits of loans without disclosing this fact. There was also ample evidence to support the conclusion that Donald and Delmar Cooper and Salazar acted in concert in committing the offenses. The convictions returned under counts one and five do not fail for lack of proof." (Appendix A-7, Francis R. Salazar's PETITION FOR WRIT OF CERTIORARI filed herein; emphasis supplied.)

Clearly, the Court gave no consideration whatsoever of the requirement of an intent to either "injure" or "defraud" the bank, the gist of the Court's ruling being the evidence was sufficient to convict because defendants received benefits of loans without "disclosing" this fact, based on the abstract statement taken out of context from United States vs. Fortunato, 402 F.2d 79, 81 (2d Cir., 1968), cert. denied, 394 U.S. 933, that the offense of "misapplication" occurred when an officer of a bank ". . . causes a loan to be made to his own benefit, concealing his interest from the bank." (emphasis supplied)4/

4/ Petitioner Salazar maintained in the Court below and reasserts here that "concealing" and the alleged failure of "disclosing" interest in loans is not one and the same thing, as "concealing" requires an affirmative act, whereas a failure to "disclose" does not, and for this reason, Petitioner Salazar's conviction below could not be sustained even on the abstract and out of context statement taken from Fortunato.

Chief Judge Friendly in Docherty, supra, addressed himself to the inappropriateness of taking a statement in an opinion out of context and reading it alone when he held inappropriate the portion of that Court's recent decision in United States vs. Iannelli, 461 F. 2d 483, 486 (2d Cir., 1972), petition for cert. filed, 41 U.S.L.W. 3137 (U.S. Sept. 19, 1972) stating:

> ". . . If the statement in that opinion (quoted by the court but omitted here) were to be read alone and out of context, it would require affirmance here. But that is not the way to read an opinion -- or anything else. A statement in an opinion must be read in the light of the facts and contentions to which it is addressed. . ." (Slip op. 303-304).

That the abstract out of context statement applied by the Court of Appeals below in sustaining Petitioner Salazar's conviction was, in fact, taken out of context is further evidenced by Judge Friendly's statement in Docherty, supra, where in reference to United States vs. Fortunato, supra, he stated that willful misapplication had been found ". . . as we have recently held, when a bank officer pocketed the proceeds of loans knowingly issued on the strength of fraudulent loan applications. . ." (Slip op. 301), a situation not remotely involved in the instant case.

United States vs. Docherty, supra, clearly emphasizes that the phrase "willfully misapply" has proved "troublesome" from the very outset and the contents of said opinion emphasizes the

vagueness of said phrase and the confusion existing among various courts as to what falls within and what falls without the scope of "willfully misapplies" as used in 18 U.S.C. §656. Clearly, the trial judge in United States vs. Docherty, supra, was confused as to the scope and extent of 18 U.S.C. §656, since, in view of Chief Judge Friendly's opinion therein, Docherty was entitled to a judgment of acquittal, as a matter of law. The trial judge, in the instant case, was also confused or skeptical as he opined ". . . Maybe this isn't even a crime. . ." (XII Tr. 2349). The Court of Appeals for the Tenth Circuit herein completely ignored any requirement of an "intent to injure or defraud" the bank and whether such a specific intent remains an element of the offense of "misapplication" in view of its omission from the present statute (18 U.S.C. §656) has been subject to judicial conjecture and speculation (see United States vs. Docherty, supra, Slip op. 302-303). If an intent to "injure or defraud" the bank remains an element of the offense of "misapplication," then in view of the omission of said required element from the present statute, this is so because of judicial legislation. On the other hand, if an intent to "injure or defraud" the bank is not an element of the offense of "misapplication," then 18 U.S.C. §656 as concerns "willfully misapply" is so broad and all-encompassing as to be overreaching in scope and constitutionally vague, leaving the standard of guilt to the "variant views of the different courts and juries which may be called on to enforce it" in violation of the Sixth Amendment (United States vs. Cohen Grocery Company, 216 F. 218, 220,

aff'd. 255 U.S. 81, 65 L.Ed. 516, 41 S.Ct. 298). That the standard of guilt as to what constitutes a "willful misapplication" under 18 U.S.C. §656 is dependent upon the "variant views" of different courts is evidenced by the Court of Appeals decisions referred to in United States vs. Docherty, supra, at Slip op. 301-302. See also the Court's statement in United States vs. Docherty, supra, that:

> "The distance between the two cases (having reference to United States vs. Iannelli, supra, and United States vs. Docherty, supra) is enough so that while Squire's case was properly found to fall within the statute, Docherty's does not."

The phrase "willfully misapplies" as used in 18 U.S.C. §656 should not be construed as encompassing the Cooper-Alpert loan transaction, especially in light of the principles applicable in the construction of criminal statutes announced in Bell vs. United States, 349 U.S. 81, 83, 99 L.Ed. 905, 910, 75 S.Ct. 620, that:

> ". . . When Congress leaves to the judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. . ."

CONCLUSION

Counsel understands that the government has not as yet determined whether to seek certiorari in Docherty and in view of the indistinguishable factual situation involved in Docherty

and the instant case the government's decision as to whether to seek certiorari in Docherty or acquiesce in that judgment bears closely upon the proper result herein. Therefore, the Court is respectfully requested to defer disposition of the Petition for Certiorari herein as well as the pending Petitions in the companion cases of Donald S. Cooper vs. United States, No. 72-525; Delmar E. Cooper vs. United States, No. 72-5454; George I. Norman vs. United States, No. 72-485, and Paul E. Cooper vs. United States, No. 72-5563, pending the government's decision with respect to Docherty.

Further, in the event the government seeks certiorari in Docherty, it is respectfully submitted that it would be appropriate upon granting certiorari that all of said cases be consolidated for a resolution of the conflict between the Tenth and Second Circuit Courts of Appeal and determination of the constitutionality and/or scope of the phrase "willfully misapplies" as used in 18 U.S.C. §656 considered in the light of United States vs. Britton, 107 U.S. 655, 27 L.Ed. 520, 2 S.Ct. 512 (1883).

Petitioner also renews the prayer of his PETITION FOR CERTIORARI for the reasons therein stated as herein supplemented.

Respectfully submitted,

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